IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

ANNA LALOR BURDICK, ET AL., *Petitioner,*

v.

CHARLES LALOR BURDICK AND THE CHEMICAL BANK & TRUST COMPANY, *Trustees, et al.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the District Court of the United States for the District of Columbia is reported in 33 Federal Supplement 921 (R. 80). The opinion of the United States Court of Appeals for the District of Columbia is reported in 123 Fed. (2) 924 (R. 136).

II.

JURISDICTION.

This Court has jurisdiction to issue the writ applied for under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936.

III.

QUESTION PRESENTED.

The question presented is whether the clause in the will of Willard A. Lalor directing that the surplus income of his estate, beginning at $54,000 per year and increasing to a possible $350,000 per year, be accumulated for a period ending 21 years after the death of the survivor of his two young nieces, is valid. Its validity is challenged by the petitioners on the ground of public policy, reflected in the common law.

IV.

STATEMENT OF THE CASE.

Willard A. Lalor, a resident of the District of Columbia, died October 9, 1934. His estate amounted to about $2,000,000 after estate taxes and expenses. By his will, after making certain educational bequests, he set up a trust, to run until 21 years after the death of his nieces Ruth and Esther Lalor, with small graduated annuities meantime to his brother, sister, nieces and nephews. He provided that the surplus income, over and above the annual payments to the beneficiaries, should accumulate until the termination of the trust, and thereupon the principal and the accumulated income should be divided among the lawful issue of the five nieces and nephews (R. 15).

As of March 26, 1940, the accumulated surplus income in the hands of the trustees was $305,237.93 (R. 102). The annual income of the trust for 1939 was $85,012.94 and the amount paid to annuitants was $31,500 (R. 102); the balance was accumulated as surplus. If Ruth Lalor, the younger of the two nieces, survives Esther Lalor, and lives her life expectancy of 34 years to the age of 65 years, the principal of the trust would amount to about $10,800,000 (R. 72, 103). If she lives to be 75 years old, the annual income of the trust in the year of its termination, at present rates of earning, would be $378,000, the annuities would total $24,000, and the accumulation of surplus income would

be about $350,000 that one year (R. 73). The corpus of the trust would then amount to $14,300,000 (R. 72-73).

The trustees of the trust brought a suit for construction of the will, asking, among other things, whether the clause requiring the accumulation of income is to be construed as valid (R. 4). All adult beneficiaries appeared as defendants, a Guardian ad litem was appointed for all minor beneficiaries and remaindermen, born and unborn, and all the defendants and the Guardian joined in the prayers for construction of the will.

The District Court of the United States for the District of Columbia held the accumulation clause invalid (R. 80, 107; 33 Fed. Supp. 921). The trustees and the Guardian appealed. The Court of Appeals reversed (R. 154; 123 Fed. (2d) 924).

V.

SPECIFICATION OF ERRORS.

Petitioners say that the United States Court of Appeals for the District of Columbia erred:

1. The Court erred in failing to hold that a will directing the accumulation of the income of the estate for lives-in-being-plus-21-years after testator's death, is contrary to public policy and invalid under the common law.

2. The Court erred in failing to examine the question of public policy in the light of present conditions and our American institutions, this being a case of first impression in this country.

3. The Court erred in holding that a tenor of judicial dictum and a general assumption by text writers, all based on an English case in 1799, not a part of our common law and instantly repudiated by Parliament, creates a precedent or a rule of common law.

4. The Court erred in holding that in the first case in which a point of law arises as an essential element of the decision, the court must rely upon a general assumption in

judicial dicta and text writers, leaving a definite declaration of the rule to the legislature because the legislature has better facilities for the study of related problems and is closer to the people.

5. The Court erred in holding that it could not hold the clause in the will in the case at bar invalid because it could not fix the standards for a valid clause.

6. The Court erred in holding the testamentary direction involved in this case valid upon any ground.

7. The Court erred in reversing the decision of the District Court of the United States for the District of Columbia.

VI.

ARGUMENT.

A.

The Controlling Law.

There is no statute on accumulations in the District of Columbia.

There is no controlling judicial decision upon the question at bar. The District Court, the Court of Appeals and all parties to the proceeding agree that this is a case of first impression.

The common law governs, and that common law is the common law of the United States, in the twentieth century, appropriate to our institutions. It embodies sound public policy as an integral part thereof.

B.

The Thellusson Case.

The Thellusson case (*Woodford* v. *Thellusson*, 4 Ves. 227; 31 Reprint 117; 11 Ves. 112; 32 Reprint 1030), is the only recorded decision directly on the point here involved. It is the source from which all authorities, judicial and

otherwise, draw their comments on the rule governing accumulations.

The Thellusson case arose in 1798 upon a will executed in 1796 by Peter Thellusson, a resident of Great Britain. The will provided that after paying the family certain relatively small amounts, the remaining income should be accumulated during the lives of testator's sons, grandsons and great-grandsons as might be living at his death, through the natural life of the last survivor. Upon the death of this survivor the fortune was to be divided into three lots, one to the eldest male lineal descendant of each of testator's three sons; and upon failure of any of these three branches, then to the other two, or the other one. Cross bills were brought in the Court of Chancery to declare the trusts void and to construe the will.

A brief but authoritative resume of the proceeding will be found in Hargrave's *Treatise on the Thellusson Act*, a copy of which can be found in the Law Library of Congress.

The arguments and opinions cover 72 pages of fine print in the English Reprints and an accurate summary is impossible within the limits of this brief. Suffice it to say that the judges called to the case by the Lord Chancellor were of opinion that in several cases the court had held that accumulated profits could, and in the absence of testamentary direction would, go to the person who by the executory devise takes the thing from which the accumulation arose, and that while the period for which such accumulations might continue had apparently never "struck the Court", yet those decisions plainly adopted for accumulations the rules pertaining to executory devises themselves; and that the intention of the testator must govern, regardless of the merit or demerit of the intention, and "however they may condemn the object." The Lord Chancellor, for the reasons outlined by the judges, held the will valid.

An extraordinary step was then taken. A bill was introduced in the House of Lords by the Lord Chancellor himself, Lord Loughborough, (see Hargrave's Treatise, p. 39) prohibiting accumulations of income for periods longer than

the minorities of minor beneficiaries or a term of 21 years. The bill was rushed to enactment and on July 28, 1800, became the law of Great Britain (39 and 40 Geo. III, ch. 98). *Thereafter*, on February 19, 1801 (Hargrave, p. 9), ten months after the opinions had been rendered, the Lord Chancellor rendered his final decree in the Thellusson case. The case was appealed to the House of Lords, was argued there for several days, and on or about June 30, 1805, was affirmed (11 Ves. 112; 32 Reprint 1030). Thus, *before the decree was entered in this unusual case*, the public policy of Great Britain was declared by legislative act at the instigation of the Lord Chancellor who heard the case.

The attitude and action of the Lord Chancellor relative to the public policy involved is pertinent and important in any consideration of the question as it arises for the first time in this country a hundred and forty years later.

The Court of Appeals in the present case correctly held that the Thellusson case is no part of the common law of this country (R. 145). The Court rested its conclusion upon the very simple ground that the Thellusson decision was not rendered until after the Revolution. We concur in the result on this point but upon many and more basic reasons. The opinion in the Thellusson case did not purport to reflect a sound public policy on the question involved; the Lord Chancellor in his role as a Member of the House of Lords applied public policy in a legislative act while the court delayed the final order in the case. The opinion is fallacious in many phases of its reasoning, as we suggested in detail in our brief below. The decision is repugnant to our institutions and therefore not part of our common law. The advisable brevity of the present argument does not permit the development of these points. In any event, we agree with the conclusion of the Court below that the Thellusson case is no part of our common law.

Having reached this stage of the case in agreement, we maintain that thereafter the Court of Appeals was in error.

C.

Contention of Petitioners.

Our position in this case is quite simple. We contend that to permit a man to decree that upon his death the income of his estate shall be withheld from the next living generation, and be accumlated for a period as long as lives-in-being-plus-21-years, is contrary to public policy. It is wrong individually and wrong socially. It is established to be wrong by reason, by history, by ethics, by economics, by every other known standard of judging a wrong. The public policy is fundamental and of vast importance. Its violation is a violation of the common law.

The Lalor Will is an exact counterpart of the Thellusson Will, of which Chancellor Kent said (Comm., Vol. 4 (14th Ed.) 285):

> "This is the most extraordinary instance upon record of calculating and unfeeling pride and vanity in a testator, disregarding the ease and comfort of his immediate descendants, for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity. *Such an iron-hearted scheme of settlement, by withdrawing property for so long a period from all the uses and purposes of social life, was intolerable.* It gave occasion to the statute of 39 and 40 Geo. III, c. 98 * * *", etc., describing the Thellusson Act. (Italics ours.)

Evidence of Public Policy.

How has the public policy involved been evidenced? The Court of Appeals referred to the extent of the research evidenced by all briefs before it. Based upon the results of that effort, two generalities can be stated. First, every legislative body which has ever made any pronouncement on the subject has forbidden accumulations for any such period as lives-in-being-plus-21-years. Second, every recognized authority which the diligence of court or counsel has been able to find, and which has commented on the public policy

involved, has declared such an accumulation to be bad in so far as such policy is concerned. No authority, judicial or legislative, has ever affirmatively declared an accumulation of this character to be valid as a matter of public policy.

We have already mentioned the action of the British Parliament in 1800. The Congress of the United States has spoken only once on the subject. In enacting a code for the Canal Zone it limited accumulations to the minorities of beneficiaries or to twenty-five years. Only thirteen state legislatures have acted in respect to accumulations. All of them have prescribed periods shorter than lives-in-being-plus-21-years.

Time and again courts have declared that statutes limiting accumulations to short periods embody the public policy. See, for example, *Porter* v. *Union Trust Co.*, 182 Ind. 637, 645; 108 N. E. 117; *In re McLaughlin's Estate*, 299 N. Y. S. 559; *Bankers Trust Co.* v. *Moy*, 265 N. Y. S. 77; *State Bank & Trust Co.* v. *Foss*, 257 Ill. App. 435; affirmed 175 N. E. 12; *Matter of Rogers*, 48 N. Y. S. 175, 177, affirmed 161 N. Y. 108; *Goldtree* v. *Thompson*, (1889) 179 Cal. 613, 22 P. 50.

Bogert on Trusts says (Vol. 1, p. 645, par. 215):

> "The litigation over Thellusson's will attracted much attention. The piling up of a fortune of the immense size which it entailed so shocked the bench and bar that a statute was passed to impose further restrictions upon settlors. It was thought to be against public policy to deprive all persons of the use and enjoyment of the income of property for such a long period and to permit the concentration of so much wealth in the hands of one person or one group. The resulting statute is called the Thellusson Act."

Foulke on *Rules Against Perpetuities* says, "This (posthumous accumulation) is a surviving relic of aristocratic and feudal institutions and is contrary to the public policy of a democracy". Holdsworth's *History of the English Law*, Vol. VII, refers to "the posthumous avarice of Peter Thellusson which showed that considerations of public policy, as well as considerations of justice to near relatives, had

made it necessary to restrain trusts for accumulation within a narrower time limit than that allowed by the rule against perpetuities". Scott on *Law of Trusts* (vol. 1, sec. 62.11) says:

> "When a Mr. Thellusson created such a trust and it was upheld, it was perceived that there was something anti-social in placing property in a position where no one would receive the benefits from it for so long a period, and Parliament felt impelled to intervene."

The Court of Appeals refers to an article by Professor Simes of the University of Chicago (R. 154). In that article the learned author said:

> "Is it more subversive of the public welfare to tie up income as well as principal than merely to tie up principal? Should the rule of law which prohibits accumulations be more drastic than that which prohibits perpetuities? The English Parliament and the legislatures of thirteen American states have answered in the affirmative. With little more to guide them than the shocking will of Peter Thellusson and the astounding possibilities of compound interest, these legislators turned out a body of restrictive rules which has endured for decades."

Basis of Public Policy.

Upon what does the public policy rest? The matter is so simple as scarcely to require statement. In the first place, an accumulation of income for lives-in-being-plus-21-years works an aggravated disherison for almost two generations. To this it may be replied that restraint of alienation for the same period likewise works disherison. But the difference is that in mere restraint of alienation of principal the beneficiaries enjoy the fruit of the trust throughout the entire term to the same extent, and perhaps more certainly, than if they had unfettered control of the corpus. Such disherison is more technical than actual. There are degrees and kinds of disherison and the legality of a lesser degree of the

admitted evil does not necessarily compel validity to the extreme limit of the possibilities.

In the second place, to permit a decedent to decree by will the accumulation of income for so long a time would enable the dead hand to vest tremendous economic power in an unknown personality of a distant generation. If Lalor's will be valid, Lalor will have placed a vast fortune and its accompanying power in the hands of an infant of unknown characteristics or, if any of the now-infants live so long, in the lap of an aged person who will have been denied all benefits of this fortune throughout the years of his greater usefulness. As the learned Justice of the District Court pointed out, this is feudal in its operation and outcome. It is repugnant to our institutions. Ethically it is a wrong. From another viewpoint it is a wrong to permit a dead hand to stagnate the flow of current income, the interchange of the products of labor and thought, upon the ease and rapidity of which the public good depends. If the rule announced by the Court in this case be generally applied, the income of any generation could be held to any specified channel by the dead direction of the past, just as Lalor would hold this income for a generation plus twenty-one years to a small list of specified investments. This is an economic wrong, violative of sound public policy.

Pressed with these latter arguments the Court of Appeals advanced several replies. It said that perhaps the anticipated growth in the trust fund would not occur, and pointed to the Thellusson estate (R. 152). The Court overlooked the fact that by a special act the British Parliament permitted the trustees of the Thellusson estate to rent the lands, in which the corpus was invested, to the beneficiaries and thus in part frustrated the intention of the testator. The Court says that the anticipated growth by accumulation rests upon "imponderable factors" (Note 49, R. 152). Even if that be so, is the decision of a question of so great general importance to rest upon the assumption that the intended result will not ensue? The Court, we respectfully

submit, cannot rest its conclusion upon an assumption that what it approves will not occur.

Next the Court says that it is "highly dubious whether size should be relevant". In so stating the Court, we respectfully submit, ignores the matter before it. To be sure, the Lalor estate is before it, but the decision is to declare the law for this jurisdiction and by persuasion for all other jurisdictions where the common law prevails. The question here is not merely whether Willard Lalor, dead, can accumulate a fortune of $10,000,000 or more. The question is whether anybody, and therefore everybody, may posthumously accumulate fortunes to the denial of the next succeeding generations and the relative aggrandizement of some distant personality. The Court is compelled in this case to declare the public policy on this matter, and it cannot cushion the impact of its finding by reasoning that if the amount in a single case were small the damage would be slight and the same rule of law must apply where the amount is large. The result of the decision must be viewed in its effect assuming the rule to be applied by every testator impelled by a selfish ambition.

In the next place, the Court said that although posthumous accumulation is bad, "living greediness is bad too", and "the whole system of inheriting is a carry over from the past". The unspoken premise in that reasoning is an identity of accumulation during life and accumulation after death. The fallacy is apparent. The right of devise, and more particularly of executory devise, was created by law, statutory or common. The law permits a fortune once accumulated to remain intact by testamentary declaration for a period of time. Social considerations, based principally upon the importance of maintaining the family unit, are held to justify such provision. There is no conceivable similarity between that principle and a rule which would permit the *accumulation* of a fortune by a person long since dead. The living have inherent natural rights, which under

our democratic concepts, include the right to accumulate and keep property. The dead have no such rights. The freedom of the living is a basic principle. To confuse it with permissive privilege of the dead is grievous error.

Other respects in which this accumulation violates public policy can be named. The necessity for brevity in the present argument prevents their elaboration. It is contrary to sound public policy to allow a dead man or a departed generation to compel income of the present and future to be invested and reinvested in a specified form of debt, as Lalor by his will sought to do. It is contrary to sound public policy to lock the disposition of the income of generations in any inflexible mold. It is contrary to sound public policy to allow a past generation to stultify the social development and to inhibit the economic growth of succeeding generations. All these points are obvious upon their statement.

The Court of Appeals has not met the issue nor answered it. The matter is of vast general importance and under the rules of this Court, certiorari lies.

D.

Opinion of the Court of Appeals.

The Court of Appeals was guided to its ultimate conclusion by three propositions, (1) that it has been "generally assumed" (R. 145), as shown by the "tenor of case law" and text books (R. 146), "albeit not in fully discussed direct holdings", that accumulation of income is permissible for the full period of the rule against perpetuities (R. 148-149), (2) that since "a court does not have as good facilities to study" related problems and periods of future interests as the legislative body, it "therefore hold(s) the accumulation provision of this testamentry disposition valid" (R. 154), and (3) that because the Court finds difficulty in fixing standards (as to size, subject, length, exceptions, etc.) for *proper* accumulations, and the next testator would thus have no guide in respect of what is good (which "would not

be a very happy policy"), the Court should not declare this clause invalid (R. 150-151).

We dispute the validity of all three of the foregoing propositions upon which the decision of the Court of Appeals rests.

The "Tenor" of the Law.

The Court of Appeals relied principally upon the "tenor of the case law" (R. 146, 147). We examine thoughtfully this view of the Court. We have read each authority and case cited. Many of them were on our brief below. The Court (a) recites a "general assumption", citing cases, (b) admits that it has found no case which directly held the rule it recites but ascribes this lack to "the accepted-in-practice common law which deterred litigation", (c) discusses *Fitchie* v. *Brown,* 211 U. S. 321, and (d) discusses *Moeller* v. *Kautz,* 112 Conn. 481, 152 Atl. 886. We consider briefly each of these points.

The cases cited by the Court as establishing a "general assumption" are in three footnotes to the opinion, Nos. 22, 28 and 29. Space does not permit analysis of each within the limits of this brief. There are twenty-one in all. Many in the list did not involve accumulations at all, but were concerned with the validity of trust estates under the rule against perpetuities. Many of them held invalid the accumulation clause involved. *Not one of them involved an accumulation for so long a period as lives-in-being-plus-21-years.* The point involved in the case now at bar was neither a part of nor necessary to the decision in any of those cases.

It is true that some of the courts recited, in their opinions, a general rule that accumulations are permitted for the full period of the rule against perpetuities. There may be a tenor of dictum. There is no tenor of decision. Does a tenor of dictum constitute a "tenor of the case law"? The rule is well stated in *Wright* v. *U. S.,* 302 U. S. 583, where this Court said:

> "The oft-repeated admonition of Chief Justice Marshal 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used' and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision' has special force in this instance."

Many other cases could be cited to this rule.

Moreover, every general expression of the courts referred to by the Court of Appeals, as an examination of the opinions will show, is premised upon the Thellusson case; and that case, as the Court of Appeals held, is not a part of our common law.

The Court of Appeals cites text writers as authorities for its general assumption (R. 145, note 20). Space here does not permit comment on each. Gray, for example, makes no statement that an accumulation for the full period of the rule against perpetuities is valid; he merely says that an accumulation for a longer period is invalid, an example of careful scholarship not to be found in all the other commentators on the matter (Gray, Perpetuities, Sec. 671). Bogert states the situation with care (Trusts and Trustees, Sec. 215, Vol. 1) and cites fourteen cases. In seven the accumulation clause was held invalid, in two no accumulation was involved, in the remaining five the periods were the lives of testator's children, the minority of testator's grandson, the grantor's own life, 20 years, and 9 years. In none was an accumulation for lives-in-being-plus-21-years involved. So with the other text writers.

The "tenor" of the statutes is an important consideration. The British Parliament, the Congress and every State Legislature which has enacted a statute on the subject, has outlawed accumulations such as this. The tendency and spirit "(not the *letter*, be it observed)" of legislation is an important control over the decisions of the courts in dealing with common law rules. *Funk* v. *U. S.*, 290 U. S. 371, 379. The Court of Appeals gave this tenor of legislation no weight.

So the position of the Court of Appeals amounts to this: That a repeated general dictum based upon an English case not part of our law and repudiated by an aroused Parliament even before the decree was entered, establishes the common law of our country and our time, although there has never been a *decision* on the point and although the uninterrupted tenor of legislative enactment has been to the contrary. We insist that the position is untenable. We insist that when for the first time such a point is a necessary element of the decision in a case before a court, the court must examine the question in the light of sound reason and the condition of our times, declare the public policy and apply the resultant rule of the common law.

It is the established law that even if there be an ancient rule, and even if Congress has failed to act, it is the duty of the court "to decide it in accordance with present day standards of wisdom and justice", even though this necessitates the overthrow of an established rule of the common law. This Court stated the controlling doctrine in *Funk* v. *U. S., supra,* and the language of its opinion on pages 379 and 383 of the Reports expresses our argument on the point. Mr. Justice Holmes once wrote (The Path of the Law, Collected Papers, p. 187), "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."

The Court of Appeals deduces from the lack of a precedent in point that the rule has been so well-established that no one has ever attempted to question it. The fact is that many less protracted periods of accumulation have been attacked in court and many held invalid, as the cas s show. The only tenable deductions are that so over-whelming an ambition for posthumous aggrandizement is a rare occurrence, or that the public policy is so obvious that few will attempt to flaunt it.

The Court of Appeals refers to *Fitchie* v. *Brown, supra,* as reflecting the "tenor of our case law." In the first place, no question as to the period of the accumulation was raised in the case or mentioned by the Court. As this Court said

in *KVOS* v. *Assoc. Press*, 299 U. S. 269, "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Moreover, even if the Court had considered the question, it would have been bound by an Hawaiian statute which provided:

> "The common law of England, as ascertained by English and American decisions, is declared to be the common law of Hawaii" (Sec. 1, Chap. 1 of the General Laws of Hawaii).

There being no American decision on the point, and the Thellusson case being the only English case, the Court would have been bound by the Thellusson decision. To apply *Fitchie* v. *Brown* as a precedent to the case now at bar, the Court would have to hold that the English law as found in the *Thellusson* case is binding at this time in this jurisdiction. There is no such rule.

In *Moeller* v. *Kautz*, 112 Conn. 481, 152 Atl. 886, cited by the Court of Appeals, the court expressly held that it had power to declare void accumulation clauses "aside from any violation of the settled rules of law, because under the peculiar facts of the case they contravene a sound public policy."

Prescription of Valid Accumulations.

The Court of Appeals next held that because it could not prescribe all the elements for valid accumulations it could not declare any accumulation invalid. With the greatest respect we submit that no proposition could be further from the established law. Every day the courts declare invalid given transactions, contracts, wills, practices, arguments, remedies, because of some undefined standard. Fraud, laches, reasonableness, recklessness, probability, even justice itself are examples. We earnestly submit that to permit this doctrine to remain in the law of this jurisdiction would create an endless confusion at total variance with the very essence of equity jurisprudence. It is an interesting

fact that Lord Nottingham was confronted with precisely the same argument in *The Duke of Norfolk's* case (3 Chan. Cases 1; 2 Ch. Rep. 229; 22 Reprint 931) when he extended the rule against perpetuities to the present generally accepted period, and in reply he said:

> "It has been urged at the Bar, where will you stop, if you do not stop at Child and Bayley's case? I answered, I will stop every where, when any inconvenience appears; no where before. It is not yet resolved, what are the utmost bounds of limiting a contingent fee upon a fee; and it is not necessary to declare, what are the utmost bounds to a springing trust of a term; whenever the bounds of reason or convenience are exceeded, the law will quickly be known." (11 Ves. 116.)

Necessity for Legislation.

The Court of Appeals held that because the legislature has better facilities than the court for the study of related problems of future interests, and because the court does not represent the people as directly as does the legislative body (R. 154), the court must hold this will valid. This is a declaration of impotency which has been denied repeatedly by judges and scholars of American jurisprudence. The common law, creation and great pride of the judiciary, is a vital, living, growing, changing body of rules. The pertinent citations are familiar, Cardozo on "The Growth of the Law", among many. None of the rules of the common law were legislative in their creation. If this declaration of the Court of Appeals remains as the law of this jurisdiction, our common law will have been stripped of that flexibility and capacity for growth and adaptation which is its peculiar boast and excellence. *Hurtado* v. *California*, 110 U. S. 516, 530; Mr. Justice Stone dissenting in *Dimick* v. *Schiedt*, 293 U. S. 474, 496. The vital, basic doctrine of the common law is that "whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice." *Katz* v. *Walkinshaw*, 141 Calif.,

116; 70 P. 663; 74 P. 766; *Flaudermeyer* v. *Cooper*, 85 Ohio St. 327; 98 N. E. 102. In *Funk* v. *U. S.*, *supra*, this Court referred to the *duty* of courts to act, in the absence of Congressional action.

We do not mean, of course, that certainty of law is not to be sought by all possible means. But here we have no decided case in point as a precedent. We have only a tenor of dictum. We have a clear public policy and an unbroken tenor of legislative declaration. We insist that it was error of tremendous general importance for the Court of Appeals to declare that under such circumstances the Court was impotent to declare the true rule of public policy and of the common law.

E.

Questions of General Importance.

Lord Campbell in his "Lives of the Lord Chancellors of England" refers to the Thellusson case and says that it "raised a question of much public importance" (Vol. VII, p. 436). The same question is in this case, the first on the point in this country. The same remark applies.

We submit that in this case the Court of Appeals for the District of Columbia has decided these questions of general importance:

(a) It decided that under the common law of this time, a decedent may by will direct the accumulation of the income of his estate for the full period of the rule against perpetuities. This is the first American decision on this point.

(b) It decided that a tenor of dictum is a tenor of case law and creates a precedent on the point involved. This is contrary to the general rule and to decisions of this Court.

(c) It decided that upon a point as to which the legislature has better facilities for the study of related problems, the court should not hold invalid a will involved in a case before it. This is contrary to many decisions of many courts.

(d) It decided that repeated dictum premised entirely upon an ancient English case, not part of our common law, creates a precedent, and in that situation the Court failed to examine the question in the light of sound reason and American conditions in our time.

We submit that under the Rules of this Court, a writ of certorari should issue. The petition should be granted.

Respectfully,

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